



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA-R08-UST-2018-0728; FRL-9986-98-Region 8]

North Dakota: Final Approval of State Underground Storage Tank Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the State of North Dakota's Underground Storage Tank (UST) program submitted by the State. The EPA has determined that these revisions satisfy all requirements needed for program approval. The State's federally-authorized and codified UST program, as revised pursuant to this action, will remain subject to the EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions.

DATES: This rule is effective March 15, 2019, unless the EPA receives adverse comment by

[INSERT DATE 30 DAYS after DATE OF PUBLICATION IN THE FEDERAL

REGISTER]. If the EPA receives substantive adverse comment, it will publish a timely document either: withdrawing the direct final publication or affirming the publication and responding to comments.

ADDRESSES: Submit your comments by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
2. Email: Bents.Benjamin@epa.gov.

3. Mail: Benjamin Bents, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P-R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

4. Hand Delivery or Courier: Deliver your comments to Benjamin Bents, Region 8, Resource Conservation and Recovery Program, Office of Partnerships and Regulatory Assistance (8P-R), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

Instructions: Direct your comments to Docket ID No. EPA-R08-UST-2018-0728. The EPA's policy is that all comments received will be included in the public docket without change and may be available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>, or email. The federal <http://www.regulations.gov> website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the EPA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4:00 p.m., Monday through Friday at the following location: EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, phone number (303) 312-6284. Interested persons wanting to examine these documents should make an appointment with the office at least 2 days in advance.

FOR FURTHER INFORMATION CONTACT: Benjamin Bents, (303) 312-6435, *Bents.Benjamin@epa.gov*. To inspect the hard copy materials, please schedule an appointment with Benjamin Bents at (303) 312-6435.

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to North Dakota's Underground Storage Tank Program

A. Why are revisions to state programs necessary?

States which have received final approval from the EPA under RCRA section 9004(b) of RCRA, 42 U.S.C. 6991c(b), must maintain an underground storage tank program that is equivalent to, consistent with, and no less stringent than the federal underground storage tank program. When the EPA makes revisions to the regulations that govern the UST program, states must revise their programs to comply with the updated regulations and submit these revisions to the EPA for approval. Most commonly, states must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) part 280. States can also initiate changes on their own to their underground storage tank program and these changes must then be approved by the EPA.

B. What decisions has the EPA made in this rule?

On July 26, 2018, in accordance with 40 CFR 281.51(a), North Dakota submitted a complete program revision application seeking the EPA approval for its UST program revisions

(State Application). North Dakota's revisions correspond to the EPA final rule published on July 15, 2015 (80 FR 41566), which revised the 1988 UST regulations and the 1988 state program approval (SPA) regulations (2015 Federal Revisions). As required by 40 CFR 281.20, the State Application contains the following: a transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant state statutes and regulations. We have reviewed the State Application and determined that the revisions to North Dakota's UST program are equivalent to, consistent with, and no less stringent than the corresponding federal requirements in subpart C of 40 CFR part 281, and that the North Dakota program provides for adequate enforcement of compliance (40 CFR 281.11(b)). Therefore, the EPA grants North Dakota final approval to operate its UST program with the changes described in the program revision application, and as outlined below in Section I.G of this document.

The State of North Dakota adopted state Senate Bill No. 2327 [S.L. 2017, ch. 199, section 75] which separated the Environmental Health Section from the North Dakota Department of Health (NDDOH) to create a stand-alone Department of Environmental Quality (NDDEQ). Per S.L. 2017, ch. 199, Section 75, the transfer of authority, power, and duties related to environmental quality from NDDOH to NDDEQ will become effective upon the North Dakota Legislative Council's receipt of the certification by the Chief of the Environmental Health Section of the State Department of Health attesting that all necessary federal approvals have been obtained and all necessary federal and other agreements have been amended to ensure the state will continue to meet the authorization requirements it currently satisfies after the

transfer of authority, powers, and duties from the NDDOH to the NDDEQ. The EPA understands that the State intends to take the necessary additional steps as specified in S.L. 2017, ch. 199, Section 75, to ensure that NDDEQ comes into existence and that the NDDEQ rules are effective as a matter of State law prior to the effective date of the EPA's approval of these revisions. This direct final rule constitutes the EPA approval of the transfer of all duties and responsibilities of the State relating to the existing federal underground storage tank program in North Dakota from the NDDOH to the NDDEQ.

C. What is the effect of this action on the regulated community?

This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already in effect in the State of North Dakota and are not changed by this action. This action merely approves the existing state regulations as meeting the federal requirements and renders them federally enforceable.

D. Why is the EPA using a direct final rule?

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and we anticipate no adverse comment. Unless the EPA receives adverse written comments during the review and comment period, the decision to authorize North Dakota's UST program revision will take effect as provided below.

E. What happens if the EPA receives comments that oppose this action?

Along with this direct final rule, the EPA is publishing a separate document in the "Proposed Rules" section of this issue of the **Federal Register** that serves as the proposal to approve the State's UST program revisions, and provides an opportunity for public comment. If the EPA receives substantive comments that oppose this approval, the EPA will withdraw this direct final rule by publishing a document in the **Federal Register** before it becomes effective.

The EPA will base any further decision on approval of the State Application after considering all comments received during the comment period. The EPA will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this approval, you must do so at this time.

F. For what has North Dakota previously been approved?

On December 10, 1991, the EPA finalized a rule approving the UST program that North Dakota proposed to administer in lieu of the federal UST program. On August 21, 1995, the EPA codified the provisions of the approved North Dakota program that are part of the underground storage tank program under subtitle I of RCRA, and therefore are subject to the EPA's inspection and enforcement authorities under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions.

G. What changes are we approving with this action and what standards do we use for review?

In order to be approved, each state program application must meet the general requirements in 40 CFR 281.11, and specific requirements in 40 CFR Subpart B (Components of a Program Application); Subpart C (Criteria for No Less Stringent); and Subpart D (Adequate Enforcement of Compliance). This also is true for proposed revisions to approved state programs.

As more fully described below, the State has made the changes to its approved UST program to reflect the 2015 Federal Revisions. The EPA is approving the State's changes because they are equivalent to, consistent with, and no less stringent than the federal UST program and because the EPA has confirmed that the North Dakota UST program will continue to provide for adequate enforcement of compliance as described in 40 CFR 281.11(b) and part 281, Subpart D after this approval.

Once the State takes the necessary additional steps as specified in S.L. 2017, ch. 199, Section 75: the NDDEQ and its rules and statutes would be effective as a matter of state law; and the authority, power, and duties of the NDDOH as the implementing agency for the UST program in North Dakota (except in Indian country) would transfer to the NDDEQ.

The State continues to have broad statutory authority to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases under North Dakota Century Code, Sections 23.1-04. The North Dakota UST Program obtains its enforcement authority from N.D.C.C. section 23.1-03. The NDDEQ has the responsibility for the administration and enforcement of this chapter. It has the power, and its duties are, to: (1) Administer the state hazardous waste management and underground storage tank programs, (2) Prepare, adopt, promulgate, modify, repeal, and enforce rules and regulations governing the management of hazardous waste and underground storage tanks, and (3) Enter into agreements or letters of understanding with other local, state, or federal agencies regarding responsibilities for regulating hazardous wastes and underground storage tanks in order to promote consistency in enforcement and to avoid duplication in regulation (N.D.C.C. section 23.1-03).

Specific authorities to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases are found under N.D.C.C. section 23.1-04-06 and 23.1-04.1, as amended effective as provided by S.L. 2017, ch. 199, section 75. The aforementioned statutory sections and regulations satisfy the requirements of 40 CFR 281.40 and 281.41.

Through a Memorandum of Agreement between the State of North Dakota and the EPA, signed by the EPA on November 9, 2018 (MOA), the State maintains procedures for receiving and ensuring proper consideration of information about violations submitted by the public. In the MOA, the State agrees to comply with public participation provisions contained in 40 CFR

281.42 including the requirement that the State will not oppose intervention under its State rule analogous to Rule 24(a)(2) of the Title IV of the Federal Rules of Civil Procedure on the grounds that the applicant's interest is adequately represented by the State. North Dakota, therefore, has met the public participation requirements found in 40 CFR 281.42.

To qualify for final approval, revisions to a state's program must be "equivalent to, consistent with, and no less stringent" than the 2015 Federal Revisions. In the 2015 Federal Revisions, the EPA addressed UST systems deferred in the 1988 UST regulations, and added, among other things, new operation and maintenance requirements; secondary containment requirements for new and replaced tanks and piping; operator training requirements; and a requirement to ensure UST system compatibility before storing certain biofuel blends. In addition, the EPA removed past deferrals for emergency generator tanks, field constructed tanks, and airport hydrant systems. The EPA analyzes revisions to approved state programs pursuant to the criteria found in 40 CFR 281.30 through 281.39.

Title 40 CFR 281.39 describes the state operator training requirements that must be met in order to be considered equivalent to, consistent with, and no less stringent than federal requirements. North Dakota did not incorporate by reference federal requirements for operator training, and has promulgated and is implementing its own operator training provisions under N.D.A.C. sections 33.1-24-08-45 to 33.1-24-08-48. After a thorough review, the EPA has determined that North Dakota's operator training requirements are equivalent to, consistent with, and no less stringent than federal requirements.

As part of the State Application, the North Dakota Attorney General certified that the State revisions meet the requirements "equivalent to, consistent with, and no less stringent" criteria in 40 CFR 281.30 through 281.39. The EPA is relying on this certification in addition to

the analysis submitted by the State in making our determination that the DEQ has revised its regulations to help ensure that the State's UST program revisions are equivalent to, consistent with, and no less stringent than the 2015 Federal Revisions. For further information on the EPA's analysis of the State's application, see the chart in the Technical Support Document (TSD) contained in the docket for this rulemaking.

H. Where are the revised rules different from the federal rules?

Where an approved state program includes requirements that are considered more stringent than required by federal law; the more stringent requirements become part of the federally approved program. (40 CFR 281.12(a)(3)(ii))

The following regulatory requirements are considered more stringent than the federal program, and on approval, they become part of the federally approved program and are federally enforceable:

At N.D.A.C. section 33.1-24-08-03.52, the State defines piping as replaced when more than 10 feet of piping is removed and other piping is installed.

At N.D.A.C. section 33.1-24-08-45, North Dakota requires facility owners and operators notify the department and provide the name of each designated Class A and B operator for each UST facility, including any changes to the Class A or B operators.

I. How does this action affect Indian country (18 U.S.C. 1151) in North Dakota?

The EPA's approval of the North Dakota Underground Storage Tank Program (State Program) does not extend to Indian country, as defined in 18 U.S.C. 1151. Indian country in North Dakota generally includes:

1. Lands within the exterior boundaries of the following Indian Reservations located within North Dakota:

- a. Fort Berthold Indian Reservation
 - b. Spirit Lake Reservation
 - c. Standing Rock Sioux Reservation
 - d. Turtle Mountain Indian Reservation
2. Any land held in trust by the United States for an Indian tribe, and
3. Any other areas that are “Indian country” within the meaning of 18 U.S.C. 1151.

Therefore, this program revision does not extend to Indian country; the EPA will retain responsibilities under the Resource Conservation Recovery Act of 1976 (RCRA) in Indian country.

II. Statutory and Executive Order (EO) Reviews

This action only applies to North Dakota’s UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by state law. It complies with applicable EOs and statutory provisions as follows:

A. Executive Order 12866 Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and 13563 (76 FR 3821, Jan. 21, 2011). This action approves and codifies state requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this final approval of North Dakota's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Because this action approves and codifies pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999), because it merely approves and codifies state requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This action also is not subject to Executive Order 13045 (62 FR 19885, Apr. 23, 1997), because it is not economically significant and it does not make decisions based on environmental

health or safety risks.

F. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a “significant regulatory action” as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA section 9004(b), the EPA grants a state’s application for approval as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental actions and interference with constitutionally protected property rights

The EPA has complied with Executive Order 12630 (53 FR 8859, Mar. 15, 1988) by examining the takings implications of the rule in accordance with the “Attorney General’s Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). “Burden” is defined at 5 CFR 1320.3(b).

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule approves pre-existing state rules which are at least equivalent to, consistent with, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by state law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). However, this action will be effective March 15, 2019, because it is a direct final

rule.

Authority: This rule is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous substances, State program approval, and Underground storage tanks.

Dated: December 13, 2018.

Douglas Benevento,
Regional Administrator,
Region 8.

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